

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Direct Access to the
INTELSAT System

)
) IB Docket No. 98-192
) File No. 60-SAT-ISP-97
)

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

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COMMENTS OF BT NORTH AMERICA INC.

BT North America Inc. ("BTNA"), by its attorneys, hereby submits comments in response to the *Notice of Proposed Rulemaking*, FCC 98-280 (rel. Oct. 28, 1998) ("Notice"), in the above-captioned proceeding. BTNA is a U.S. subsidiary of British Telecommunications plc ("BT"), which, among its worldwide activities, is the U.K. Signatory to the International Telecommunications Satellite Organization ("INTELSAT").

I. INTRODUCTION AND SUMMARY

INTELSAT's direct access policies permit users of the INTELSAT satellite system other than Signatories to obtain service directly from INTELSAT and to invest directly in INTELSAT in proportion to their use. This proceeding now considers whether the FCC can and should permit U.S. entities to have these forms of access, known respectively as Level 3 and Level 4. More than 90 nations have implemented either or both of these forms of direct access. The failure of the United States to implement direct access, meanwhile, stands in stark contrast to its

historic leadership in opening up other aspects of its telecommunications market to competition. It also fails to keep pace with the widescale liberalization that is being implemented as a result of the WTO Agreement, which the U.S. has strongly supported.

As BTNA demonstrates below, BT successfully implemented Level 4 direct access in the United Kingdom in 1994, which any properly authorized entity operating a satellite earth station is permitted to invest in INTELSAT in accordance with its usage, obtain INTELSAT capacity at the same INTELSAT Utilization Charges ("IUC") that BT pays and receive a return on its investment at the same rate as BT. Because Level 4 users pay no more for space segment than the IUC, and because neither BT nor the U.K. government has a gatekeeping function, BT and all other Level 4 users compete on a level playing field. Direct access has reduced costs of INTELSAT access in the U.K. far below equivalent charges in the U.S. and significantly increased competition in the U.K. satellite services market. These benefits should now be extended to consumers in the U.S. BTNA strongly encourages the FCC to continue to take the pro-competitive steps with respect to INTELSAT direct access that it has taken to open other American markets to competition. Permitting entities other than Signatories to invest in INTELSAT is also consistent with and will further its commercialization, which BT actively supports.

The Communications Satellite Act of 1962 ("Satellite Act"), 47 U.S.C. § 701 *et seq.*, gave the Commission authority to adapt its regulation to accommodate

the creation of the global satellite system known today as INTELSAT and to help shape its development over time. Congress noted originally the importance of this flexibility to the statutory scheme and emphasized recently that the Satellite Act permits both Level 3 and Level 4 access. In fulfilling its obligation to maximize competition and lower rates, as well as its long-standing commitment to taking a leadership role in opening U.S. markets, the Commission should authorize users of INTELSAT to access space segment at Level 4.

II. DIRECT ACCESS OPERATES SUCCESSFULLY IN THE UK

[Notice, Sections II(2)-II(4)]

A. The U.K. Successfully Introduced Level 4 Access In 1994

Level 4 direct access was implemented by BT in the U.K. in April 1994, shortly after INTELSAT put its policy into place. BT actively supported the implementation of the direct access framework within INTELSAT. BT also worked constructively with the U.K. Party to the INTELSAT Agreement, the U.K. Department of Trade and Industry ("DTI"), to introduce INTELSAT direct access in the U.K.

Prior to the introduction of direct access by BT, INTELSAT access by entities other than BT was arranged by the BT Signatories Affairs Office ("SAO"). The SAO provided a gateway for BT's competitors to order INTELSAT capacity through BT with assurance that the proprietary information that they gave the SAO would not be made available to BT's regular commercial operations. BT charged these entities the same IUCs that it paid, and added a 7% charge to

compensate it for the costs it incurred in placing the orders. When direct access was implemented on April 1, 1994, the SAO ceased to act as intermediary between U.K. satellite operators and BT as Signatory.

Under the U.K. Level 4 direct access procedure, any entity licensed in the United Kingdom to operate earth stations using INTELSAT space segment capacity or to provide satellite services using INTELSAT space segment capacity may have Level 4 direct access. Because the DTI has issued a class license covering such earth stations, both operators and end-users may obtain Level 4 access to INTELSAT. Level 4 investors may request to be included as advisors in the U.K. delegation to Board of Governors meetings and at meetings of INTELSAT advisory committees. They also may apply to attend the annual Meeting of Signatories. The Governor who heads the U.K. delegation, normally a BT employee, retains the right to determine attendance and will not withhold his or her agreement unreasonably.

BT offers at least one briefing per quarter for Level 4 entities to discuss the positions to be taken by the U.K. Signatory at Board of Governors' meetings. BT also will consult with the U.K. government concerning these meetings where it is appropriate to do so. Level 4 entities and entities that are considering becoming investors in INTELSAT may also approach the U.K. Government directly.

Customers in the U.K. who do not wish to acquire capacity directly from INTELSAT or invest in INTELSAT may obtain capacity from BT or from other satellite operators who have Level 4 access.

B. Direct Access Competitors Pay Only INTELSAT Charges, Not a Mark-Up to BT

Level 4 entities obtain INTELSAT space segment at the same tariff as BT, by paying the IUC directly to INTELSAT. Following the introduction of direct access to INTELSAT, BT chose not to separate out the costs of the Signatory function and those associated with its purely commercial interests, believing that there would be little to be gained by sharing these costs as it would introduce a considerable level of extra administrative burden and therefore greater costs if BT were to do so. BT does not incur any “marketing/sales,” “operational,” or “transactional” costs or taxes in relation to the operations of direct access to INTELSAT customers, such as those that the Comsat Corporation (“Comsat”) argues it would have to bear on behalf of U.S. direct access customers. See Notice at ¶ 47. BT also does not incur what Comsat has described as the costs of satellite launch and insurance. See *id.* at ¶ 46. Thus, BT’s actual experience in the direct access environment over the past four and one-half years is completely contrary to Comsat’s assertion that direct access would result in increased regulatory and administrative costs. See *id.* at ¶ 12.

The rates BT charges for satellite service using INTELSAT rates reflect commercial considerations. BT does not factor into its pricing decisions “a ‘mark-up’ over the IUC . . . to recover . . . costs associated with its Signatory and carrier functions,” as Comsat describes its own practice, because BT believes that any such costs are difficult to identify as separate from BT’s own commercial

undertaking and are, in any case, inconsequential. *See id.* at ¶ 46. Nor does BT assess a charge on the direct access entities to recover any such costs. Comsat's position that direct access would not result in significant cost savings has not been borne out by the U.K. experience. *See id.* The FCC should recognize that even before BT put direct access into place, other satellite operators were already obtaining INTELSAT capacity in the U.K. at the level of the IUC through BT's SAO, with the addition of the 7% charge. Direct access had the effect of eliminating the extra charge. No surcharges or other artificial mechanisms were put into place to cancel out the price reductions and restrain competition. Instead, a Signatory Charge, intended to compensate BT for its previous practice of ordering INTELSAT capacity on behalf of other operators, was removed. Thus, FCC implementation of direct access certainly will lower the cost of INTELSAT access in the U.S., where all users have been forced to pay Comsat's marked-up monopoly rates. 1/

1/ While the operations of the SAO in the U.K. prior to the introduction of direct access had advantages over the INTELSAT access system applied in America today, particularly its guarantee to all operators of access to service at the IUC with the limited 7% service charge, the FCC should not adopt any form of that system. Any gatekeeper role by Comsat, which continues to fight hard to preserve its monopoly, risks anti-competitive behavior that would undermine competitive access. Moreover, BT has shown that if other entities can deal directly with INTELSAT, no fees or surcharges should be required.

C. Direct Access Has Fostered A Highly Competitive U.K. Satellite Market

At the present time, there are 20 investing Level 4 customers in the U.K. These entities and their INTELSAT utilization shares are shown below: ^{2/}

| Organization | Investment Shares |
|---------------------------------------|--------------------------|
| Cable & Wireless PLC | 0.364626 |
| Cable and Wireless Communications PLC | 0.984437 |
| CBS Overseas Inc. | 0.000001 |
| Comsat General (UK) | 0.069816 |
| Data Marine Systems Ltd. | 0.000001 |
| Datasat Comm. | 0.050508 |
| Globecast Northern Europe Ltd. | 0.005635 |
| Kingston Comm. | 0.000000 |
| Loral Orion Europe GmbH | 0.003175 |
| Lyman Brothers | 0.018209 |
| Muslim Television | 0.000001 |
| National Physical Lab. | 0.000000 |
| NTL | 0.000001 |
| Newsforce | 0.101290 |
| Orion Atlantic L.P. | 0.000001 |
| RedWing Satellite Solutions Ltd. | 0.000000 |
| Spacelink Int'l Ltd. | 0.004751 |
| TeleBermuda International Ltd. | 0.003284 |
| Teleport London | 0.000001 |
| VYVX International Ltd. | 0.000001 |

BT's investment share is 5.687150, yielding a total share for U.K. companies of 7.292888. It is worth noting that at least four of these entities are U.S.-owned companies, including a subsidiary of Comsat, the company that would foreclose direct access to potential competitors in the United States.

^{2/} All referenced investment shares are as of December 1, 1998, and are available on INTELSAT's world-wide web page: <http://www.intelsat.int/ext-rel/signat/signat.htm>.

As a result of the intense competition in the U.K. market, price margins are believed to be vastly lower than those of Comsat in the U.S., reflecting the intense competition that BT faces from other operators generally and from Level 4 entities in particular. The very substantial participation in direct INTELSAT access in the U.K. by a diversity of parties, as well as the intensely competitive nature of this U.K. market, demonstrates the success of this policy. Moreover, direct access has not diminished BT's interest in or commitment to INTELSAT. ^{3/} BT believes that direct access is in the economic interest of INTELSAT and in its own interest as holder of the second largest investment share in INTELSAT. BT also views Level 4 access as an interim step towards INTELSAT dealing with customers on a true commercial basis.

III. THE SATELLITE ACT MANDATES THAT NON-SIGNATORY U.S. CARRIERS AND USERS BE GRANTED BOTH LEVEL 3 AND LEVEL 4 DIRECT ACCESS TO THE INTELSAT SYSTEM.

[Notice, Section II(1)]

In view of the United States' leading role in the development of INTELSAT from its inception in 1967, the extent to which other INTELSAT member states have acted to facilitate Level 3 and Level 4 direct access, and the

^{3/} The Chief of the International Bureau of the FCC recently informed the House of Representatives that, whereas BT's voting strength on the INTELSAT Board of Governors has not diminished since its implementation of Level 4 direct access, Comsat's voting power has been steadily decreasing over the years but might increase through direct access. Letter from Regina M. Keeney to Thomas Bliley, December 22, 1997, reprinted in Record of Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection re: "Communications Satellite Competition and Privatization Act of 1998," Sept. 30, 1997 at 146, 148.

continuing erosion of artificial barriers to both international trade and telecommunications, the United States' failure to provide for direct access to the INTELSAT system is anomalous and anachronistic. See H.R. Rep. 105-494, 105th Cong., 2d Sess. 21 (1998) (finding that "the United States is behind other nations" with respect to granting direct access and that "[c]onsumers pay the price for this"). Equally important, as will be shown below, there is no impediment, from either a statutory or policy standpoint, to the Commission's prompt implementation of direct access by non-Signatory carriers and users.

A. Congress Has Expressly Recognized the Commission's Authority Under the Satellite Act to Grant Both Level 3 *and* Level 4 Direct Access.

The Commission has tentatively concluded that it has discretion under the Satellite Act to authorize only Level 3, but not Level 4, direct access to non-Signatory U.S. carriers and users. See Notice at ¶¶ 2, 15. But this conclusion is impossible to reconcile with the express findings by the House of Representatives -- findings selectively quoted, but inexplicably ignored, in the Notice -- that the Satellite Act as written currently authorizes the Commission to grant both Level 3 *and* Level 4 direct access.

In passing H.R. 1872, the "Communications Satellite Competition and Privatization Act of 1998," the House proposed to permit direct access to the INTELSAT system by all "providers or users of telecommunications services" in order to stimulate increased competition and lower prices in the domestic market for satellite services. See H.R. 1872, 105th Cong. § 641 (1998); H.R. Rep. 105-494 at

21. As the Commission acknowledges, that legislation “would require the Commission to permit Level 3 and Level 4 direct access subject to a determination that certain circumstances exist.” Notice at ¶ 4 n.8. ^{4/} Curiously, however, the Notice does not refer to the accompanying express finding by the Commerce Committee

that both direct access for space segment capacity and investment direct access are in the public interest and that such interest will be served by adopting all forms of direct access as soon as possible. *The Committee finds that the Commission currently has the authority to permit direct access under current statutes.*

H.R. Rep. 105-494 at 21 (emphasis added). Indeed, the Committee emphasized that “[b]y including provisions in this bill on direct access the Committee does not intend to imply that there is a need to amend any provision in the [Satellite] Act to provide

^{4/} The Commission also correctly notes the statement in the Report of the Committee on Commerce accompanying the legislation that Commission action with respect to direct access need not await passage of the proposed legislation. See Notice at ¶ 4 n.9 (citing H.R. Rep. 105-494 at 61 (Commerce Committee “does not intend to prevent the Commission from exercising its existing discretion to provide for direct access to INTELSAT . . . prior to the deadlines outlined in the bill”)). BTNA strongly objected to language in the Bliley Bill restricting direct access for signatories or their affiliates. While BTNA does not believe that there should be any restrictions on direct access in the United States, if restrictions are placed on such access, they must conform to the commitments made by the United States in the WTO Agreement and current FCC policy. Direct access must be provided to WTO member countries. The effective competitive opportunities (“ECO”) test may be applied for non-WTO member countries for determining whether access may be allowed. This would follow from the policy established by the FCC in *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891 at ¶¶ 119-42 (1997) (“*Foreign Participation Order*”). In any event, the Report states the Commerce Committee’s finding that the FCC now has discretion under the Satellite Act to adopt both Level 3 and 4 access.

for direct access.” *Id.* at 61. This language, reflecting Congressional interpretation of the Satellite Act and expressing its intent with respect to the provision of Level 3 and Level 4 direct access, should be dispositive of the issue confronting the Commission in this proceeding. To the extent Comsat or other commenters contend -- or the Commission believes -- that the provision of Level 4 direct access would necessitate amendment of the Satellite Act, a finding already has been made to the contrary.

This view of the Commission’s discretion under the Satellite Act is entirely consistent with the intent of the Act’s framers. The INTELSAT system was not in existence at the time the Satellite Act was enacted. Congress recognized that, once created, the international system necessarily would undergo changes over time as its ownership and governance evolved, and that a flexible regulatory scheme would be required in order to accommodate such changes. Comsat merely would be “the repository of whatever may be the U.S. interest arising from international agreements covering the system.” H.R. Rep. 1636, 87th Cong., 2d Sess. 26 (Additional Views of John E. Moss and John D. Dingell). That interest now incorporates agreements permitting space segment (Level 3) and investment (Level 4) direct access by non-Signatories. As explained below, grant of such access will not alter the fundamental role of Comsat as INTELSAT Signatory, *i.e.*, the repository of the United States’ interest in the system.

B. The Satellite Act Requires That All Authorized Users and Carriers Should Have Nondiscriminatory Access to INTELSAT, Which Includes Both Level 3 and Level 4 Direct Access.

Comsat's contention that the Commission lacks authority to permit Level 3 or Level 4 direct access, *see* Notice at ¶¶ 25-26, proceeds from false premises. The Satellite Act by its terms requires the Commission to ensure that "all present and future authorized carriers shall have nondiscriminatory use of, and equitable access to, the communications satellite system" 47 U.S.C. § 721(c)(2). ^{5/} In addition, Section 701(c) states that "[i]t is the intent of Congress that all authorized users have nondiscriminatory access to the system." ^{6/} Contrary to Comsat's repeated contention ^{7/}, these sections expressly provide a right of nondiscriminatory access not to Comsat, but to the "*communications satellite system*" -- *i.e.*, INTELSAT -- to be created under international auspices, with U.S. participation, pursuant to the 1962 Act. In view of the consistent use of the term "system" to refer to the proposed international satellite network -- in both the

^{5/} An "authorized carrier" is defined under the Satellite Act as "a communications common carrier which is specifically authorized or which is a member of a class of carriers authorized by the FCC to own shares of stock in the corporation." 47 U.S.C. § 734(b)(1).

^{6/} 47 U.S.C. § 701(c). The Commission has held that an authorized user may be a non-carrier entity. *See, e.g., Authorized User*, 100 F.C.C.2d 177 (1985), *aff'd*, 804 F.2d 1280 (D.C.Cir.1986) (allowing a broad class of users to take service from Comsat, including non-common carriers such as enhanced-service providers).

^{7/} *See, e.g., Comsat Corporation, "An Analysis of the FCC's Authority to Mandate 'Direct Access' for the INTELSAT System" at 3, dated December 24, 1997* ("The provisions do not put other U.S. carriers or 'authorized users' on the same footing as COMSAT; rather, they ensure that all U.S. customers are treated equally by COMSAT.").

Satellite Act itself and its legislative history -- Section 721(c)(2) simply cannot be read as requiring that carriers be afforded nondiscriminatory access to *Comsat*.

Furthermore, Section 401 of the Satellite Act separately calls for the corporation (ultimately to be known as "Comsat") to be regulated as a common carrier, 47 U.S.C. § 741, with its own separate obligation to "furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities, foreign and domestic" 47 U.S.C. § 735(a)(2). Thus, the statute provides two parallel means of nondiscriminatory access to the global satellite system: directly, where authorized by the Commission, and indirectly, through the corporation. Nowhere in the Satellite Act or its legislative history is there any indication that Comsat was intended to have exclusive space segment.

Similarly, and contrary to Comsat's position, financial participation in INTELSAT by carriers other than Comsat is not limited to indirect investment through Comsat if approved by the Commission. As the foregoing discussion makes clear, the Commission may authorize other entities to receive nondiscriminatory and equitable access to INTELSAT. Nondiscriminatory and equitable access to INTELSAT by an authorized carrier necessarily means access on the same terms as those enjoyed by Comsat, including not only usage charges but also terms of ownership. 8/

8/ Comsat's activities overseas undermine its arguments against space segment investment. Although the Satellite Act says nothing about Comsat's ability to become an investor in INTELSAT space segment provided by other Signatories,

C. Nothing in the Satellite Act Gives Comsat Any Exclusive Right to Acquire Capacity from, or to Hold an Ownership Interest in, INTELSAT.

Under section 735(a) of the Satellite Act, Comsat “is authorized to,” among other things, “plan, initiate, construct, own, manage, and operate itself or in conjunction with foreign governments or business enterprises a commercial communications satellite system” 47 U.S.C. § 735(a)(1). The authorization to “own” the system is not exclusive. ^{9/}

The Commission acknowledges that the Act’s authorization to Comsat under the same section to “[f]urnish for hire, channels of communication to United states communications common carriers and other authorized entities” is not exclusive. 47 U.S.C. § 735(a)(2); Notice at ¶ 24. Prior Commission decisions also indicate that Comsat’s authority under section 735 (a) to own and operate satellite terminal earth stations is not exclusive. *See, e.g., RCA Global Communications, Inc., et. al.*, 3 FCC Rcd. 2814 (CCB 1988). Thus, nothing in section 735(a) grants Comsat any exclusive authority.

Comsat has taken advantage of the openness of satellite regulations in the United Kingdom, for example, to become a Level 4 direct access customer there. This investment, despite the absence of specific authorization for it in the Satellite Act, demonstrates Comsat’s implicit recognition that the use of space segment by direct access is an avenue to competition that should not be barred simply because the Satellite Act (which predated its availability) does not expressly provide for it (or any other means of investment, for that matter).

^{9/} The Satellite Act also provides for carriers other than Comsat to make “additions . . . with respect to facilities of the system.” 47 U.S.C. §§ 721(c)(9), (10). This further demonstrates that the grant of authority to Comsat to “own” the satellite system is not exclusive.

Contrary to Comsat's position, *see* Notice at ¶ 23, the Satellite Act does not make Comsat the "sole participant" in INTELSAT; in fact, that phrase never appears in the Act. Nor does the Satellite Act's requirement that "United States participation in the global system shall be in the form of a private corporation, subject to appropriate government regulation," give Comsat any exclusive right to acquire capacity from INTELSAT directly or to have an ownership interest in INTELSAT. *See* 47 U.S.C. § 701(c). 10/

Instead, the Satellite Act establishes Comsat as a participant in INTELSAT on behalf of the U.S. *government*, not on behalf of the U.S. communications industry: "In order to facilitate this development and to provide for the widest possible participation by private enterprise, United States participation in the global system shall be in the form of a private corporation, subject to appropriate governmental regulation." 47 U.S.C. § 701(c). As evidenced by Section 701(a), in which Congress declares the policy of the United States, the reference to "United States" denotes the country or its government but does not imply an exclusive territory for service. *See* 47 U.S.C. § 701(a). The structure of the Act, whereby the President, NASA, and the Commission supervise, consult, regulate or otherwise interact with Comsat, further supports this interpretation. *See* 47 U.S.C. § 721.

10/ The Commission has correctly concluded that Comsat's authority to undertake certain activities in connection with the operation of the system, such as furnishing channels of communication, is not exclusive. *See* Notice at ¶ 24.

This distinction ultimately was reflected in Comsat's role as Signatory to the INTELSAT agreements. Simply stated, Comsat's right to "participate" in INTELSAT is embodied in its right to participate in Board of Governors' meetings and to vote. The right to participate does not grant Comsat any commercial exclusivity either with respect to the acquisition of INTELSAT capacity or ownership interests. The Notice itself explicitly recognizes the critical distinction between investment and involvement in the governance of INTELSAT. "A Level 4 customer is not accorded rights to participate in the INTELSAT governance unless special arrangements are made by the Party and Signatory representing its country." Notice at ¶ 9.

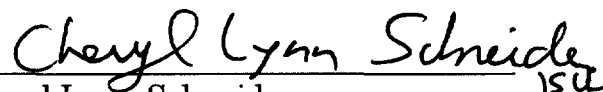
In sum, Congress drafted the Satellite Act to accommodate flexibly the development of an international satellite system that it acknowledged would inevitably evolve in form and substance over time. *See supra* Section III.A. It serves no public interest to read into the Act a requirement for a monopoly franchise which is neither explicit nor implied, even if an FCC policy that has outlived its usefulness has been used to justify such exclusivity. INTELSAT has grown into a highly successful organization that not only permits, but encourages both competitive access to its capacity and investment from users other than its Signatories. The Commission can and should invoke its authority under the Satellite Act to keep pace with these developments by immediately authorizing users operating through U.S. earth stations to acquire INTELSAT capacity directly and U.S. carriers to invest in INTELSAT directly.

IV. CONCLUSION

In this brief, BT has shown that the Commission can and should adopt rules that would permit U.S. carriers and users to obtain Level 4 direct access to INTELSAT. It follows that a policy that would allow Comsat's competitors Level 3 access, but deny them Level 4, would preserve Comsat's return on its exclusive investment that it can use to underprice its U.S. competitors. The only truly competitive INTELSAT access market in the U.S. will be one which allows Level 4 access. That policy would uphold the FCC's leadership role in telecom liberalization and underscore the U.S. commitment to WTO principles.

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CERTIFICATE OF SERVICE

I, Patricia Green, a legal secretary with the law firm of Hogan & Hartson L.L.P., hereby certify that on this 22nd day of December, 1998, a copy of the foregoing Comments of BT North America Inc. was hand delivered to each of the parties listed below.


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